**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

UNITED STATES OF AMERICA,	§	
	§	
V.	§	**Criminal No. 2:10-316-1**
	§	**Civil No. 2:16-233**
SERVANDO ALVARADO-CASAS,	§	

MEMORANDUM OPINION AND ORDER

Servando Alvarado-Casas filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and amended motions seeking relief from his sentence pursuant to *Johnson v. United States*, 135 S.Ct. 2551 (2015). D.E. 287, 289, 291. Alvarado-Casas was sentenced in 2010 to 190 months in the Bureau of Prisons for conspiracy to transport unlawful aliens causing serious bodily injury to and placing in jeopardy the lives of others. He did not appeal, but filed a motion pursuant to 28 U.S.C. § 2255 in 2011. The Court granted him an out of time appeal. He appealed, and his sentence was affirmed on appeal. After his appeal, he filed a § 2255 motion in 2014 that this Court denied.

In June 2016, Alvarado-Casas filed a letter motion that the Court recharacterized as a § 2255 motion and that, at the Court's request, Alvarado-Casas amended. The letter motion was mailed on June 13, 2016, according to the certificate of service.

ANALYSIS

Alvarado-Casas' present motion was filed after a previous § 2255 motion; thus, his current motion is a second or successive motion. In pertinent part, 28 U.S.C. § 2255(h) provides:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –
>
> > (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by

> clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

Where a claim is second or successive, the movant is required to seek, and acquire, the approval of the Fifth Circuit before filing a second § 2255 motion before this Court. *See Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir. 2000); 28 U.S.C. § 2244 (b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."). Alvarado-Casas' motion does not indicate that he has sought or obtained permission from the Fifth Circuit to file the present motion. Until he does so, this Court does not have jurisdiction over the motion.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Although Alvarado-Casas has not yet filed a notice of appeal, the § 2255 Rules instruct this Court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11, § 2255 Rules.

A certificate of appealability (COA) "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To warrant a grant of the certificate as to claims denied on their merits, "[t]he petitioner must

demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This standard requires a § 2255 movant to demonstrate that reasonable jurists could debate whether the motion should have been resolved differently, or that the issues presented deserved encouragement to proceed further. *United States v. Jones*, 287 F.3d 325, 329 (5th Cir. 2002) (relying upon *Slack*, 529 U.S. at 483-84). As to claims that the district court rejects solely on procedural grounds, the movant must show both that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

The Court finds that Alvarado-Casas cannot establish at least one of the *Slack* criteria. Accordingly, he is not entitled to a COA as to his claims.

CONCLUSION

For the foregoing reasons, Alvarado-Casas' motions (D.E. 287, 289, 291) are **DENIED** as second or successive and he is **DENIED** a Certificate of Appealability. The Clerk is instructed to **TRANSFER** the motion to the Fifth Circuit Court of Appeals as an unauthorized second or successive motion. *See In re Epps*, 127 F.3d 364, 365 (1997).

It is so **ORDERED**.

SIGNED this 22nd day of November, 2016.

JOHN D. RAINEY
SENIOR U.S. DISTRICT JUDGE